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In the

Supreme Court of the United States

October Term, 1940

NO. 283

RAILROAD COMMISSION OF TEXAS, ET AL,
Appellants

v.

THE PULLMAN COMPANY, ET AL,
Appellees

BRIEF FOR APPELLANTS,
Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, Jerry Sadler, and Gerald C. Mann

Appeal from the District Court of the United States for the Western District of Texas

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SUBJECT INDEX

TABLE OF CASES AND STATUTES

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OPINION BELOW

The opinion of the statutory three-judge court, dated April 3, 1940, (R. 359) is reported in 33 Fed. Supp. 675.

STATEMENT OF GROUNDS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under Sections 238 and 266 of the Judicial Code, as amended by the act of February 13, 1925 (United States Code, Title 28, Sections 345 and 380). The judgment appealed from in this case was dated and filed April 23, 1940. (R. 364) This appeal was allowed by an order of the District Court entered on June 18, 1940. (R. 384) The record was filed in this court on July 26, 1940; and the order noting probable jurisdiction was entered on October 14, 1940.

STATEMENT OF THE CASE

(A) PLAINTIFFS' COMPLAINT AND NATURE OF THE SUIT

This suit was brought in the District Court of the United States for the Western District of Texas by The Pullman Company and twelve railroads as plaintiffs, against the Railroad Commission of Texas, the three members thereof, and the Attorney General of Texas, as defendants, asking the court to restrain by injunction the enforcement of an order of the Railroad Commission of Texas whereby it was required that all sleeping cars be in the charge and care of a pullman conductor.

The pleadings and evidence showed that on August 8, 1939, the Railroad Commission of Texas en-

tered an order on its own motion relating to the operation of sleeping cars, and thereupon the Pullman Company requested a hearing, and notices were issued as provided by the rules of the Commission for the time and in the manner provided by law; and appearances were made by the Pullman Company, the various railroads, and the Order of Sleeping Car Conductors, each represented by their attorneys and a hearing held beginning August 31, 1940. (R. 9, 37 and 65) Upon the conclusion of said hearing an order, dated November 4, 1939, was entered by the Commission, which provided in part as follows:

> "The Commission thus finds that all of the parties interested in the subject matter have been duly notified for the time and in the manner provided by law and that all of said parties entered an appearance in this cause and, with all parties having announced ready, the Commission proceeded to hear the oral testimony of seventeen witnesses, some of whom were offered by the railroad companies, the Pullman companies and the other parties at interest, as well as documentary evidence, and after a full, final and complete hearing of evidence, which lasted for two days and after argument of counsel, the Commission being fully advised in the premises, FINDS:
>
> "(1) The Pullman Company has made arrangements with the railroads of Texas by the terms of which it is obligated to furnish standard sleeping and parlor cars, properly equipped and acceptable to the railroad company, sufficient to meet the requirements of travel over

the lines of railroads operated by said companies in Texas and under such contract it has the exclusive right to operate pullman cars and sleepers over the railways in Texas, except that the railroads should have the right to operate their own parlor cars, either exclusively or in addition to the parlor cars furnished by the Pullman Company.

"(2) The contracts between the Pullman Company and the railroads provide that the Pullman Company shall have the right to collect from the occupants of its cars for the use of seats, berths and rooms therein such fares as shall be charged on competing lines of railroads.

"(3) While the various contracts differ as to the compensation the railroads are to receive from the Pullman Company for this exclusive right to furnish such cars and services, they all provide in substance that all receipts from operations above a given sum per car per annum shall be divided between the railway company and the Pullman Company in various and graduated proportions. The railroad companies are thus directly interested in the charges made by the Pullman Company for the use of its seats and services to the extent of sharing in the profits over and above a given amount per car per annum and this indirectly amounts to a tariff charge or additional compensation to the railroads for the privilege of riding in cars and obtaining services rendered by the Pullman Company under such contracts. All of this is in addition to the extra fare required to be paid by a passenger before he can have the privilege of purchasing a seat in and

the accommodations provided by the pullman cars.

"* * * *

"(7) The railroads of Texas are charging the maximum sum allowed by the Statutes of this state for passengers who desire to ride in sleeping cars or pullman cars, namely, 3c per mile. This charge is made and collected by the railroad companies. In addition thereto, sleeping car companies or the Pullman Company collects an extra fare for the privilege of riding in pullman cars. * * *

"(8) The Commission finds from the evidence that there are seventeen separate and distinct operations on the various railroads in Texas without pullman conductors in charge of pullman cars. The Commission further finds that all other runs other than the seventeen operations disclosed by the evidence, do have a pullman conductor in charg e of the pullman cars; *that the failure to have pullman conductors on the seventeen operations is a discrimination against the passengers who ride on those particular runs in that all other operations of Pullman cars do have Pullman conductors;* that in every instance the same rates and fares are exacted by the railroad companies and the Pullman Company and in one instance the services of a Pullman concudtor are offered and in the other instances enumerated, namely, the seventeen operations, such services are not rendered. (Italics ours).

"* * * *the failure on the part of the railroad*

companies and that of the Pullman companies to thus provide such service and protection to such passengers is an abuse, a disadvantage and an undue and unjust discrimination against all passengers who ride on any one or more of said seventeen operations where Pullman conductors are not used. (Italics ours).

"* * * *

"(13) Pullman conductors are especially trained by the Pullman Company to render a special type service to passengers riding in the Pullman cars. * * *

"* * * *

"(25) *That it is impossible for the train conductor to perform all the duties required of him in the operation of the train and likewise perform the additional duties of a Pullman conductor.* * * * (Italics ours).

"* * *

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that it is necessary in order to correct the abuses aforesaid and eliminate the existing unreasonable and undue disadvantage, prejudice and discrimination to such described traffic that the services, safety, convenience and comfort for which such extra fare is paid and as contracted between the railroads and the Pullman Company be provided, and that failure to provide it is to the unreasonable and undue disadvantage and prejudice to and a discrimination against the said pas-

sengers as described, and would be charging a fare for which contracted services are not performed.

" * * *

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no sleeping car shall be operated on any line of railroad in the State of Texas * * * unless such cars are continuously in the charge of an employee * * * of * * * the rank and position of Pullman conductor.

" * * *

"IT IS FURTHER ORDERED by the Railroad Commission of Texas that in any case where it is the desire of any railroad company, receiver or trustee to operate over its line of railway a sleeping car or cars without fully complying with the provision of the orders above set out, the Commission shall be notified and its consent secured before such change or deviation from the terms of said orders is put in force.

"It is not the intention of the Commission to place any burden on interstate commerce. If any part of this order or the application and the enforcement thereof when applied to any one or more railroads or any operation thereof be held to be an undue burden on interstate commerce, then such holding shall not affect this order as applied to other operations by railroads not amounting to an undue burden on interstate commerce.

"* * * *." (R. 37)

The complaint of the Pullman Company and the twelve railroads, as plaintiffs, alleged that the Pullman Company is a private corporation organized under the laws of the State of Illinois, that eight of the plaintiff railroads are incorporated under the laws of the State of Texas, and that the other plaintiff railroads and trustees operating them are corporations and/or residents of other jurisdictions. (R. 1)

The pleadings and evidence showed that the Pullman Company is engaged in the sleeping car business in that it owns sleeping cars (known as Pullman cars), that each of the other plaintiffs, separate from each other, operate railroads and train service thereon; and that the Pullman Company had entered into a contract with each of the other plaintiffs whereby it furnishes sleeping cars with crew (conductors and porters) and equipment for use in the trains operated on the railroad lines of each of the other plaintiffs. (R. 6, 65) All of said contracts provide that the Pullman Company shall have the right to collect from the occupants of its cars for the use of the seats and berths and other accommodations therein such fares as are charged on lines of railroads competing with the lines of the contracting railroad companies where similar accommodations are furnished; and the Pullman Company shall provide suitable employees for collecting such fares and furnish the usual sleeping car service to the passengers therein. (R. 6, 65)

It appeared from the pleadings and evidence that the only connection between any of the plaintiffs is that the Pullman Company furnishes the sleeping cars, with a crew (conductors and porters), to each of the other plaintiffs for use on their railroad lines. These other plaintiffs each operate their railroads and their trains separate from each other. (R. 6)

The pleadings and the evidence showed that the railroads and trains operated by some of the plaintiffs are entirely within the State of Texas and are therefore *intrastate* operations, but that in the case of some of the other plaintiffs they operate *interstate* trains between Texas and other states. In other words, only a part of the plaintiffs operate interstate trains. (R. 17 to 20, and 68)

The plaintiffs' complaint prayed that a temporary injunction be granted, and that on final hearing that the same be made permanent, enjoining the defendants from enforcing said order of the Railroad Commission of Texas; and the principal grounds on which it asked for such injunction were (1) that "the order is not within the authority delegated to the Railroad Commission by any statute or law of the State of Texas," (2) that "it is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States in that it will deprive the plaintiffs of their property without due process of law," and (3) that "said order as applied to the plaintiffs * * * constitutes an * * * interference with interstate commerce in violation of the com-

merce clause of the Constitution of the United States." (R. 30)

(B) TEMPORARY RESTRAINING ORDER GRANTED

A temporary restraining order was granted by a District Judge of the United States District Court for the Western District of Texas on November 28, 1939. (R. 56)

(C) THREE-JUDGE COURT ORGANIZED

After the temporary restraining order was granted, a three-judge court was organized under Section 266 of the Judicial Code (United States Code, Title 28, Section 380); and said court tried the case on the merits. (R. 58)

(D) OTHER PARTIES INTERVENE

Prior to the trial, leave was granted to three Pullman porters to intervene as plaintiffs and to three Pullman conductors to intervene as defendants, and they participated in the trial in said capacities. (R. 73 to 77)

(E) DEFENDANTS' ANSWER

The defendants filed and urged a motion to dismiss in which it was contended, among other things, (1) that the complaint failed to state a cause of action in favor of any plaintiff against any defendant

upon which relief could be granted (Par. 1, Motion to Dismiss), (2) that there was a misjoinder of plaintiffs because the complaint alleged that when the order was enforced against some of the plaintiffs it constituted an interference with interstate commerce but as to other plaintiffs it did not constitute such an interference (Par. 2, Motion to Dismiss), (3) that there was a misjoinder of plaintiffs and causes of action because the causes of action alleged by the various plaintiffs were separate from each other (Par. 3, 4 and 6, Motion to Dismiss), (4) that the Pullman Company had no cause of action because it did not have sufficient interest (Par. 5, Motion to Dismiss), (5) that no cause of action was stated because the complaint did not allege that there was "insufficient evidence or no evidence before said Commission to support or justify said order, or that said Commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before said Commission said orders were arbitrary or unreasonable," (Par. 7, 10, 11, Motion to Dismiss), and (6) that it was improper to allege the total property rights that would be destroyed exceeded $3,000.00 because "each of the plaintiffs has an independent action, the value to all of the plaintiffs jointly could not be considered as determining the jurisdictional question." (Par. 15, Motion to Dismiss.) (R. 60)

The defendants also filed an answer, subject to its motion to dismiss, admitting that said order had been passed by the Commission, but denied the al-

legations in the plaintiffs' complaint by which it was sought to invalidate the order, and denied that the enforcement of said order interfered with interstate commerce or took property without due process of law, and the defendants also pleaded specially that "the Railroad Commission had before it ample and sufficient evidence sustaining the facts therein (in the order) found," and that said order and the enforcement thereof did not contravene the Federal Constitution, and that the Commission was acting within the authority of the Constitution and statutes of the State of Texas. (R. 65)

(F) EVIDENCE ON CONTRACTS AND REASONABLENESS OF ORDER

During the trial a large amount of evidence, both oral and documentary, was introduced by both sides. The plaintiffs offered proof to substantiate their allegations with reference to the contracts that exist between the Pullman Company and the various railroads and proved that the fares charged to ride in the sleeping (Pullman) cars is one cent per mile in addition to the three cents per mile per day coach fare charged all passengers by the railroad company, and in addition to said one cent, plus said three cents (total 4c) charge, there is also a charge made for the seat or berth in the Pullman car. (R. 79 to 359)

There was a large amount of testimony on the question of whether or not as far as the safety and welfare of the passengers is concerned, a Pullman

conductor in addition to a train conductor is needed on the trains having sleeping cars.

The witness M. B. Cunningham, who had been a sleeping car conductor in the employ of the Pullman Company for thirty-five years, testified that as part of his duties a Pullman conductor is responsible for the operation of the Pullman cars in general, that he looks after the air-conditioning (R. 269, 270, 293), cleanliness and condition of the porters (R. 269, 272) sanitation of the cars and compliance with the State Sanitary Code (R. 269, 270, 277), that sometimes old people and children are placed in his care (R. 269), that it was his duty to render first-aid and take care of the passengers in case of a wreck and that all Pullman conductors had been given special training in that respect and he said he had been in several wrecks (R. 278), he testified to particular instances showing that the porters employed by the Pullman Company cannot handle the passengers and that particularly during convention crowds and extra heavy business some passengers abuse the porters and consequently the porters cannot properly control the passengers without the aid of a Pullman conductor (R. 273), he stated that one of the problems he had to deal with was that of men and women misconducting themselves together and he cited several instances of immoral conduct (R. 273, 274, 275, 276), and according to his testimony the use of intoxicating liquor is on the increase and both men and women passengers become intoxicated quite often and he

indicated that a porter could not properly handle such a person, particularly if it was a woman (R. 280, 281), and he testified that the train conductor only comes through the sleeping cars once on some trips and that sometimes when they are busy "they can't possibly come back through" the sleeping cars on the entire trip (R. 291); and he said that the porters make up the berths and have charge of the linen (R. 270, 271).

The witness W. M. Hadley, who had been a conductor for the Pullman Company for fifteen years, testified that one of his duties was to keep decorum in the Pullman cars (R. 296 307), that durnig his experience as a sleeping car conductor he had many cases of parents placing their children in his care on the Pullman cars for a trip without the parents and he told of some such instances (R. 297), he said that aged and infirm people were placed in his care as Pullman conductor and he told of an occasion when an old blind lady was placed in his custody and her condition was such that he had to help her to the rest room (R. 297, 309), he also testified that he had had a number of cases of men and women attempting to become unduly intimate with each other and he described specific instances and stated that he always had stopped such conduct (R. 298, 308), he too testified that the drinking of intoxicating liquor was very prevalent and that he had had to take care of drunk people, including a man with delirium tremens and a woman who became so intoxicated she became almost helpless (R. 300, 305, 306), he testified that one of his tasks was the super-

vision of the cleanliness of the cars and that some porters were negligent in that respect and in some instances they did not keep the floors clean of beer bottles and cigarette stubs unless directed by the Pullman conductors (R. 300, 301), he explained that porters had difficulty in controlling the ventilation and the heating and cooling systems of the sleeping cars and that the Pullman conductors usually attended those things. (R. 303)

The witness C. E. Lowery, who had been an employee of the M. K. & T. Railroad Company continuously since the year 1892 and who had served as a train conductor the past twenty-three years, testified to specific instances of the misconduct between men and women passengers and to other misconduct, including student pranks, on the Pullman cars (R. 326, 327, 329), and his testimony shows that porters alone cannot control or properly handle passengers on trains in Texas and he stated that people in general do not have the respect for Pullman porters that they do for the train conductors and the Pullman conductors (R. 326, 327), and he testified positively that "*it would be much better*" for a Pullman conductor to be in charge of the Pullman cars, "*that the situation would be better taken care of,*" and that the *safety of the passengers and the train* would be better taken care of in his opinion if a Pullman conductor was in charge of the sleeping cars (R. 330); and it was his testimony that sometimes when he was acting as train conductor he was so busy with his other duties that

he could not go back to the sleeping cars more than once during his regular 109 mile run and that he left the care of the sleeping cars to the Pullman employees. (R. 328, 329)

Many other witnesses testified in support of the defendants' contention that a Pullman conductor contributed to the safety and comfort of the passengers. Among these witnesses was W. L. Beamer, who had served as a train conductor most of the time since 1907 (R. 316 to 323), and Mrs. H. B. Shank, a mother of two children, who testified that she was so fearful of Pullman porters that she would not ride in a Pullman car if it had no Pullman conductor and had only a porter in charge (R. 335).

(G) TRIAL COURT'S JUDGMENT.

After hearing the evidence the court took the case under advisement, and on April 23, 1940, entered judgment overruling the defendant's motion to dismiss and permanently enjoining the defendants from enforcing said orders of the Railroad Commission of Texas or from penalizing the plaintiffs for violating said orders. (R. 364)

All of the defendants, including the intervening defendants, excepted to the judgment of the court. This appeal is from said judgment.

SPECIFICATION OF ERRORS TO BE URGED

1.

The court erred in overruling and in not sustaining the plea of the defendants to the jurisdiction of the court, their motion to dismiss and their motions relating to misjoinder of causes of action, misjoinder of parties plaintiff, and an unlawful delegation of chartered rights from the railroad companies to The Pullman Company because

(a) The court had no jurisdiction to entertain a bill in equity wherein the plaintiffs pleaded that they were engaged in an illegal and unlawful enterprise in that the railroad company by contract attempted to delegate a part of their charter powers to a foreign corporation, namely, The Pullman Company, in view of the mandatory provisions of Article 6260, Revised Civil Statutes of Texas, which requires that only corporations chartered under the laws of the State of Texas may operate railroads in said state, and the damages as alleged by the plaintiffs to sustain jurisdiction were based upon interfering with the rights of the railroad companies and The Pullman Company under such invalid contracts, and

(b) The court had no jurisdiction to entertain the plaintiffs' bill which pleaded that some of the plaintiffs resided in the State of Texas and others resided without the State of Texas and it was not

alleged with certainty the specific damage, if any, suffered by each of the plaintiffs.

2.

The court erred in holding that the Railroad Commission of Texas was without authority to promulgate the order complained of in that Article 6473 of Vernon's Annotated Revised Civil Statutes of Texas provides "if any railroad company * * * shall charge * * * or receive a greater rate, charge, or compensation than that fixed and established by the Commission * * * such railroad company * * * shall be deemed guilty of extortion;" and the pleadings and proof showed without contradiction that the defendant railroads by contract with the defendant, The Pullman Company, were charging rates, fares and tolls for the transportation of passengers that had not been fixed or promulgated by the Railroad Commission, and therefore the plaintiffs had no standing in a court of equity and no right to ask for equitable relief.

3.

The court erred in not sustaining the defendants' motions to dismiss the plaintiffs' bill of complaint because it appeared in said bill that the railroad companies had delegated to The Pullman Company a part of their charter powers, and in this indirect way the railroad companies were charging fares, tolls and rates for themselves in an amount in ex-

cess of the maximum sum allowed by the statutes of the State of Texas, and the railroad companies were doing indirectly what they cannot do directly, and therefore plaintiffs had no standing in a court of equity.

4.

The court erred in holding that the order complained of by the Railroad Commission of Texas was made without statutory authority, because the laws of the State of Texas are mandatory in requiring that said Commission make rules and regulations governing railroads, namely, Article 10, Section 2 of the Constitution of Texas, and Articles 6445 and 6474 of the Revised Civil Statutes of Texas, which provisions of the law authorize the Commission to make the order in question.

5.

The court erred in issuing a permanent injunction against the Railroad Commission of Texas, the members thereof, and the Attorney General of Texas, enjoining said parties from carrying into effect the order in question, because in doing so the court substituted its own opinion for that of the Railroad Commission of Texas.

6.

The court erred in holding that the Railroad Commission of Texas was without authority to promul-

gate a rate order, because Article 6448 of the Revised Civil Statutes of Texas imposes a duty upon the Railroad Commission to fix the rates of all railroads and because Article 6449 of the Revised Civil Statutes of Texas provides that ten days notice of such hearing shall be a sufficient notice, and in this case the order in question recited on its face that notice was issued on August 19, 1939, and hearing held on August 31, 1939, and the order recited that "the Commission thus finds that all parties interested in the subject matter have been duly notified for the time and in the manner provided by law," and said ruling of the court was in conflict with the decisions of the Supreme Court and the other courts of the State of Texas, and the attack on said order in regard to said notice is a collateral attack and a collateral attack cannot be maintained against such an order.

7.

The court erred in holding that the attempts of the Railroad Commission of Texas to regulate the rates charged by the Pullman Company were void and that the Commission had no jurisdiction over the Pullman Company, because Title 71, Chapter 4, Revised Civil Statutes of Texas, and particularly Article 4477 of said statutes, imposes the mandatory duty upon the Railroad Commission to enforce the Public Health Sanitary Code of the State of Texas, and this was an order authorized by said code and the statutes in regard to the enforcement thereof.

8.

The court erred in holding that the Railroad Commission had no authority to regulate the rates to be charged by The Pullman Company, because all railroads that do business in the State of Texas must be chartered under the laws of the State of Texas and all such railroads are under the direct supervision of the Railroad Commission, and the railroads cannot delegate their chartered powers to The Pullman Company by contract and thereby escape regulation of the Railroad Commission or create an agency free from regulation by the Railroad Commission.

9.

The court erred in entering a judgment enjoining the Railroad Commission of Texas, the members thereof, and the Attorney General of Texas, from enforcing the order in question, because the Railroad Commission of Texas had the authority to pass and enforce said order by virtue of the fact that the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses (Article 10, Section 2, Constitution) and the Legislature has passed such a law and has conferred authority on the Railroad Commission of Texas "to govern and regulate * * * railroads" and "to correct abuses," and "to prevent * * * abuses in the conduct of their business" (adopted 1911 and now codified as Article 6445 of the Revised Civil Statutes of Texas) and

the Legislature has not left it up to the Railroad Commission to define the "abuse," but the Legislature has defined the abuse involved in this case by saying that "unjust discrimination is * * * prohibited and" it shall constitute unjust discrimination "if any railroad * * * shall give any undue * * * preference or advantage to any particular person * * * or locality, or subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever" (Article 6474 of the Revised Civil Statutes of Texas); and therefore, the Railroad Commission of Texas had the authority to adopt said order in question and enforce the same.

10.

The court erred in making any findings of fact of any kind because it is not for the Federal Courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better, and it is not proper for the court to determine which witnesses should be believed and which ones should be disbelieved, but it is only a question of whether or not there is any evidence on which the Commission's judgment can be founded, and as there was such evidence in this case the Federal Court cannot disturb or interfere with the Commission's judgments or orders.

11.

The court erred in making the findings of fact set

out in paragraph 7 of the court's findings of fact filed in this case, said findings of fact in said paragraph 7 beginning with the words "All of the Pullman porters in Texas" and ending with the words "there is no reasonable basis for finding contrary to the facts stated in this finding No. 7," because said findings of fact so set forth in paragraph 7 of the court's findings are contrary to the evidence and are not supported by the testimony and the evidence in this case.

12.

The court erred in overruling and in not sustaining the plea of the defendants to the jurisdiction of the court, and their motions to dismiss, because the plaintiffs in this case had no standing in a court of equity, for the reason that they relied on contracts between the railroad companies in this case and The Pullman Company, and said contracts between said railroad companies and The Pullman Company are monopolistic and violate both the United States and the State laws prohibiting trusts and monopolies and contracts in restraint of trade, and said contracts so relied on and pleaded and urged by the plaintiffs are void and illegal.

13.

The court erred in holding (as stated in paragraph 2 of the court's conclusions of law) that the railroads are necessary and proper parties to this ac-

tion, because such a conclusion is contrary to the evidence and testimony in this case and contrary to law.

14.

The court erred in holding (as stated in paragraph 6 of the court's conclusions of law) that the challenged orders in question were not within the powers delegated to the Railroad Commission of Texas because the Railroad Commission has authority by virtue of the fact that the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses (Article 10, Section 2, Constitution) and the Legislature has passed such a law and has conferred authority upon the Railroad Commission of Texas "to govern and regulate * * * railroads" and "to correct abuses," and "to prevent * * * abuses in the conduct of their business" (Adopted 1911, and now codified as Article 6445, Revised Civil Statutes of Texas), and the Legislature has not left it up to the Railroad Commission of Texas to define the "abuse," but the Legislature has defined the abuse involved in this case by saying that "unjust discrimination is * * * prohibited" and it shall constitute unjust discrimination "if any railroad * * * shall give any undue * * * preference or advantage to any particular person or locality or subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever;" and because of said provisions of the law of Texas, the Railroad Commission has authority to make and enforce such order.

15.

The court erred in holding (as stated in paragraph 7 of the court's conclusions of law) that the power to issue the challenged order in question is not derived from Article 6445 of the Revised Civil Statutes of Texas, because said Article 6445 authorizes the Railroad Commission of Texas "to govern and regulate * * * railroads" and "to correct abuses" and "to prevent * * * abuses in the conduct of their business," and the failure of the defendants to comply with the order in question, that is, operate sleeping cars on lines of railroads in Texas without said cars being in the charge of a Pullman conductor, and operate sleeping cars on other lines with Pullman conductors in charge, is an abuse under the facts in this case, and has been defined as an abuse by the Legislature of Texas under Article 6474 of the Revised Civil Statutes of Texas; and therefore the Railroad Commission of Texas had authority to make the order in question.

16.

The court erred in holding (as stated in paragraph 8 of the court's conclusions of law) that no Texas Statute has defined as an abuse, or prohibited, the operation of a sleeping car that is not in charge of a Pullman conductor, because the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses and the Legislature of Texas has passed said law, to-wit: Articles 6445, 6448 and 6474 of the Revised Civil Statutes of Texas.

17.

The court erred in holding (as stated in paragraph 9 of the court's conclusions of law) that the challenged orders are not within the authority delegated to the Railroad Commission of Texas by Article 6474 of the Revised Civil Statutes, because said Article 6474 provides that if any railroad shall give any undue preference or advantage to any particular person or locality it is an unjust discrimination, and under the facts in this case plaintiffs have been, and are now, operating sleeping cars on some lines of railroads without said cars being in charge of Pullman conductors, and at the same time have operated sleeping cars on other lines with said cars being in charge of a Pullman conductor and the operation of sleeping cars on different lines in different manners in such fashion constitutes a discrimination and an abuse in violation of Article 6474.

18.

The court erred in holding (as stated in paragraph 11 of the court's conclusions of law) that the Texas Legislature having enacted a full crew law requiring a crew of four men on a train, the Railroad Commission thereby has no authority to pass the order in question requiring Pullman conductors to be in charge of all sleeping cars, because said full crew law is a separate act of the Legislature and does not prevent the Railroad Commission of Texas from preventing abuses and discrimination as authorized by Article 10, Section 2, Constitution of

Texas, and Articles 6445, 6448 and 6474 of the Revised Civil Statutes of Texas.

19.

The court erred in denying and overruling the defendant's motion to dismiss and in holding (as stated in paragraph 15 of the court's conclusions of law) that the defendant's motion to dismiss should be denied, because the plaintiffs' complaint failed to state a cause of action in favor of any plaintiff against any defendant upon which relief could be granted, in this, to-wit, the complainant failed to allege that there was insufficient evidence or that there was no evidence before the Railroad Commission of Texas to support or justify the orders in question, or that said commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before said Commission said orders were arbitrary and unreasonable, or that said order or the enforcement thereof constituted unlawful interference with interstate commerce, or that said orders of the enforcement thereof constituted a taking of the plaintiff's property without due process of law.

20.

The court erred in permanently enjoining the defendants from attempting to enforce the orders in question, because the jurisdiction of the United States District Court, where this case was tried,

did not rest on diversity of citizenship, and therefore the only question open to said Court was whether or not the state action complained of, to-wit: said Railroad Commission action and order and the enforcement thereof, transgressed the Constitution of the United States and whatever "vague contours * * * the Due Process Clause may place upon the exercise of the State's regulatory power," and therefore the trial court did not have authority or power to adjudge or decree that the Railroad Commission was without statutory authority, that is, did not have authority under the Texas Constitution and statutes, to adopt and enforce the said orders.

21.

The court erred in holding (as stated in the court's opinion and in its conclusions of law, and particularly in paragraph 6 of the Court's conclusions of law) that the orders in question are not within the powers delegated to the Railroad Commission, because the jurisdiction of the United States District Court, where this case was tried, did not rest on diversity of citizenship, and therefore the only question open to said Court was whether or not the state action complained of, to-wit, said Railroad Commission action and order and enforcement thereof, transgressed the Constitution of the United States and whatever "vague contours * * * the Due Process Clause may place upon the exercise of the State's regulatory power," and, therefore, the trial court did not have authority or power to adjudge or de-

cree that the Railroad Commission was without statutory authority, that is, did not have authority under the Texas Constitution and statutes to adopt and enforce said orders.

SUMMARY OF ARGUMENT

I

The trial court should have entered judgment for the defendants (appellants) in this case for the reason that *the plaintiffs (appellees) did not allege or prove a cause of action*, because (a) the plaintiffs' claim is based upon the contracts between the Pullman Company and the railroad companies and said contracts are illegal and void by virtue of the fact that they call for charging passenger fares of more than three cents per mile in violation of the statutes of the State of Texas, (b) the plaintiffs' claim is based upon said contracts and said contracts are illegal and void because they contemplate that the Pullman Company will engage in operating a railway in this State, which is a violation of the law of the State of Texas because said company is not incorporated for such purpose under the laws of this State, and (c) this suit has not been properly brought under Article 6453 of the Revised Civil Statutes of Texas, which is the only law under which it can be maintained.

II

The Railroad Commission of Texas has authority under the Constitution and the statutes of the State of Texas to make and enforce the order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor. Therefore, the trial court erred in holding that the order was not sustained by the provisions of the statutes.

III

The order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor, is reasonable and contributes to the safety and welfare of the passengers, and therefore, does not violate the Fourteenth Amendment to the Constitution of the United States.

IV

The order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor, and the enforcement thereof, does not unlawfully interfere with interstate commerce and it does not violate the interstate commerce provision of the Constitution of the United States.

V

As there was statutory authority for the making of the order in question, and as said order was rea-

sonable and did not violate the Fourteenth Amendment, the trial court erred in granting a "blanket" injunction in behalf of all of the plaintiffs covering all lines, because the facts showed that the situation of each plaintiff and each line was different and that possibly some of the plaintiffs were entitled to an injunction but that the other plaintiffs were not entitled to such relief, and because the facts further showed that the plaintiffs who possibly had a cause of action had not applied to the Commission, as provided in the order, for a modification of the order as applied to them. The evidence showed that some of the lines and runs were entirely within the State of Texas, but that a few of the other lines and runs crossed over into other states; and the evidence showed that the traffic was heavier and required a Pullman conductor more in the case of some lines and runs than in the case of other lines and runs.

ARGUMENT

I

The trial court should have entered judgment for the defendants (appellants) in this case for the reason that the plaintiffs (appellees) did not allege or prove a cause of action, because (a) the plaintiffs' claim is based upon the contracts between the Pullman Company and the railroad companies and said contracts are illegal and void by virtue of the fact that they call for charging passenger fares of more than 3 cents per mile in violation of the statutes of

the State of Texas, (b) the plaintiffs' claim is based upon said contracts and said contracts are illegal and void because they contemplate that the Pullman Company will engage in operating a railway in this State, which is a violation of the law of the State of Texas because said company is not incorporated for such purpose under the laws of this State, and (c) this suit has not been properly brought under Article 6453 of the Revised Civil Statutes of Texas, which is the only law under which it can be maintained.

(a)

Article 6416, Revised Civil Statutes of Texas, reads in part as follows:

> "The passenger fare on all railroads in this State shall be three cents per mile. . . . "

Article 6473, Revised Civil Statutes of Texas, reads in part as follows:

> "If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand, or receive a greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars, . . . on the line of its railroad, or any line operated by it, . . . or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less

than one hundred nor more than five thousand dollars."

Thus, we see that by virtue of said Article 6416 the maximum fare that a railroad company can charge is 3 cents per mile, and that by virtue of said Article 6473 if a railroad charges a greater compensation for the transportation of passengers than the amount allowed by the Commission it is guilty of "extortion."

If a railroad company makes a contract to violate said above quoted statutes, that is, makes a contract to charge fares in excess of the amount allowed by law, such a contract would undoubtedly be void. Such appears to be the law according to the case of *Thomas* v. *West Jersey Railroad Company*, 101 U. S. 71, in which this court said:

> " . . . it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. . . . Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more is done under a contract forbidden by law, the stronger the claim to its enforcement by the courts."

The plaintiffs' cause of action was based upon the contracts between the Pullman Company and the

various railroads. In fact the plaintiffs alleged that "the action of the Commission . . . constitutes, in effect, an impairment of the obligation of said contracts in violation of that provision of the Constitution of the United States denying any State the power to pass any law impairing the obligation of contracts." (R. 28) However, the proof shows conclusively that the contracts provide that passengers who ride on sleeping cars are to be charged one cent per mile in addition to the three cents per mile collected by the operating railroad company, a total of four cents per mile, and also are to be charged an additional sum for the use of berths and seats (R. 6); and the evidence shows that said terms of the contracts are actually carried out (R. 79 to 180). We submit that this amounts to charging a passenger fare of more than three cents per mile, and is a direct violation of Article 6416 and Article 6473, quoted above. The plaintiffs have no right to maintain a cause of action based upon an illegal contract and unlawful acts.

A case construing said Article 6416 that we think supports our contention is the case of *Southern Pacific Company* v. *Patterson*, 27 S. W. 194, by the Texas Court of Civil Appeals, in which it was held that said statute prohibited an extra fifty cents charge per person being made (so as to cost the passenger a total of more than three cents per mile) for crossing a bridge belonging to another company that was used by the railroad hauling the passenger. The court said:

> " . . . We are of opinion that it was not in the power of the defendant . . . to make, or authorize to be made upon its right of way, an improvement, and thereby create the right to demand more than the lawful rate per mile for travel over it. . . . "

We believe that in this case the plaintiffs' cause of action, if any, depends upon a state of facts whereby the plaintiffs are charging more than the maximum lawful rate of three cents per mile for passenger fares. The plaintiffs should not be allowed to maintain such a suit.

(b)

Article 6260, Revised Civil Statutes of Texas, reads as follows:

> "No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct, build, *operate*, acquire, own or maintain any railways within State." (Italics ours)

In the case of *Philip A. Ryan Lumber Co.* v. *Ball*, 197 S. W. 1037, by the Texas Court of Civil Appeals, First District, the Philip A. Ryan Lumber Company was a Tennessee corporation, and it made a contract to buy timber from Ball to be used in the lumber company's sawmill, and the contract provided that the lumber company would transport the timber from the forest for a distance of six miles by means of a logging railroad. In the contract it was agreed

that Ball would build the railroad and that the lumber company would furnish the engines and cars. Ball refused to carry out the contract, and in a suit by the lumber company for damages because of breach of contract the court held that the contract was illegal in that it contravened Article 6260 (then 6406), and the court said:

> " . . . we can see no reason why appellant, under the agreement it here undertook, would not have been under the bar of article 6406, Revised Statutes of Texas, passed by the Legislature in 1903 (Acts 1903, p. 90), and in effect ever since. . . . "

In this case the Pullman Company's rights and cause of action, if any, exist by virtue of the contracts by which it furnishes cars, with an operating crew, to be operated on railway lines in Texas, although the company is not chartered under the laws of Texas. This suit has been brought to enjoin the Railroad Commission of Texas and the other defendants from interfering with said contracts. (R. 28, 29, 30) In the Philip A. Ryan Lumber Company case the lumber company only furnished and operated cars and engines on a logging railroad, and in this case the Pullman Company furnishes and operates sleeping cars on main line passenger railroads. The Pullman Company is clearly violating said Article 6260, and its suit cannot be maintained.

It might be contended that the Pullman Company is not operating a railroad in this case, but that it

has turned its cars and operating employees over to the various Texas railroad companies, and said companies are really doing the operating, but such argument is not tenable in view of the language in the case of *Pennsylvania Railroad Co.* v. *St. L. A. & T. H. R. Co.*, 118 U. S. 290, which reads as follows:

> "We think it may be stated, . . ., that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchise, and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.
>
> " . . .
>
> " . . . A contract to perform for the Indianapolis and St. Louis Railroad Company obligations which it was forbidden to assume, and which it had no authority to assume, must itself be void. There is no power shown in any these companies to accept a lease of the complainant such as the one in the present case, and perform its conditions, and they cannot, therefore, become parties to such a contract with a road outside the State which chartered them any more than the principal company. . . . "

We sincerely submit that the Pullman Company is engaged in operating a railroad in Texas, and as it is not chartered under the laws of Texas it is performing said operations illegally, and it and the other plaintiffs have no right to enjoin the Railroad Commission of Texas from doing anything that would interfere with said illegal operations.

(c)

We are submitting the hereinafter argument only in the event this Honorable Court does not see fit to sustain the foregoing contentions and argument.

As pointed out in the "statement of the case" above, the Railroad Commission of Texas held a hearing at which the parties to this suit appeared, in which it considered evidence, and thereupon made the order in question (quoted above). The Commission clearly had a right to hold such a hearing by virtue of Article 6450, Revised Civil Statutes of Texas, which says:

> "The Commission may adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges, and other acts required of it under this law; and no person shall be denied admission at such investigation."

If the Pullman Company or any other party was dissatisfied with said order, said party is limited to

a direct appeal "to a court of competent jurisdiction in Travis County, Texas" as provided in Article 6453, Revised Civil Statutes of Texas. The Commission's orders are final if not appealed from in the manner prescribed in said Article 6453, and said orders cannot be questioned in a collateral attack. Said Article 6453 provides, in part, as follows:

> "If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. . . . "

We sincerely believe that the Pullman Company and the other plaintiffs are confined to the procedure prescribed in said above quoted statute. Any other procedure or method of attack on the Commission's order would be a collateral attack. We state, without fear of contradiction, that unless a Railroad Commission order is void it cannot be questioned in a collateral attack. In the case of *Texas Steel Co.* v. *F. W. & D. C. Ry. Co.*, 120 Tex. 597, in a Commission of Appeals opinion adopted by the Supreme Court of Texas, the court said:

> "It is the settled law of this state that the Railroad Commission is a quasi judicial body.

Producers Refining Co. et al v. M. K. & T. Ry. Co. of Texas (Tex. Com. App.), 13 S. W. (2d) 679.

"Since the Railroad Commission is a quasi judicial body it follows that an order regular upon its face made by the commission is not subject to collateral attack. Article 6452-6453, R. C. S. of Texas, 1925; West Texas Compress Co. v. Railway Co. (Texas Com. App.), 15 S. W. (2) 558; Producers Refining Co. v. M. K. & T. Ry. Co., 13 S. W. (2d) 679; Id., 680; Railroad Commission v. Weld, 95 Texas 278, 66 S. W. 1095; M. K. & T. Ry. Co. of Texas v. Railroad Commission, 3 S. W. (2d) 489; Empire Gas & Fuel Co. v. E. L. Noble et al. (Tex. Com. App.), 36 S. W. (2d) 451."

In the case of *Railroad Commission of Texas* v. *Beaver Reclamation Oil Co.*, 132 Tex. 27, in a Commission of Appeals opinion adopted by the Supreme Court of Texas, the court said:

"It is of course definitely settled that the general orders of the Railroad Commission are presumed to be reasonable and valid *until attacked in a direct suit for that purpose, as provided by statute.* It is also definitely settled that the validity and reasonableness of a general order cannot be attacked in a collateral proceeding such as is this suit. Railroad Commission v. Marathon Oil Co., 89 S. W. (2d) 517 (writ ref.); Turnbow v. Barnsdall Oil Co., 99 S. W. (2d) 1096 (writ ref.)." (Italics ours)

The plaintiffs never made it clear in the trial, to

our way of thinking, as to whether they were bringing a direct attack on the order as prescribed by said Article 6453, or were bringing a collateral attack. We think they intended for their suit to be a direct attack; that is, "a statutory suit against the Commission" under said Article 6453. But, the only case directly in point that we have found holds that such a suit cannot be maintained in a United States District Court, and that is the case of *Henderson* v. *Terrell*, 24 Fed. Supp. 147, which was a three-judge District Court case in which Judge Hutcheson of the Circuit Court of Appeals wrote the opinion and said:

> "Though plaintiffs and defendants are both citizens of Texas, plaintiffs bring their suit as though in addition to being one arising under the Constitution and laws of the United States it is also one under the Texas statutes authorizing a review of the Commission's orders by suits filed against the Commission in the State District Court of Travis County. Authorized as plaintiff would be, if the requisite diversity existed, to bring their suit under the statute in the Federal District Court of Travis County, McMillan v. Railroad Comm. of Texas, D. C. 51 F. 2d 400; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014, we think it plain that, *residents of Texas as they and defendants are, plaintiffs cannot maintain their suit as a statutory suit against the Commission in this court . . . . .*" (Italics ours)

It is our belief that the only way the plaintiffs (appellees) can escape the rule stated by Judge

Hutcheson in the *Henderson* v. *Terrell* case, supra, is to shift their position and say that this is a collateral attack and not a direct attack in the form of a "statutory suit" under Article 6453. We now and hereby call on the appellees (plaintiffs) to advise the court and the appellants whether they are bringing a direct or a collateral attack in this case.

If the plaintiffs (appellees) have brought a collateral attack then they are limited to the contention that the order is void, that is, that the Railroad Commission of Texas had no authority to make it. We think the Commission had authority to make and enforce the order, which we will explain later in this brief. If it had such authority, and this suit of the plaintiffs' (appellees') is a collateral attack, the plaintiffs have no right to maintain their suit.

At this point we wish to call the court's attention to the fact that the defendants contended by motion to dismiss at the trial (R. 62), and now contend, that the plaintiffs' complaint did not state a cause of action because it did not allege that there was "insufficient evidence or no evidence before said Commission to support or justify said order, or that said Commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before said Commission said orders were arbitrary or unreasonable." There is not a word in the plaintiffs' complaint alleging there was *insufficient evidence* before the Commission; and in view of the failure to make such an allegation we do not believe

the plaintiffs were entitled to complain about a lack of evidence.

In the case of *Railroad Commission of Texas* v. *McDonald*, 90 S. W. (2d) 581, by the Texas Court of Civil Appeals, Third District, a suit had been brought to review an order concerning motor carrier regulations, and the court said:

> "The test is, not what the court's independent judgment might be, but *whether there was substantial evidence before the Commission to* sustain its order." (Italics ours)

As there were no pleadings raising the question of whether or not there was substantial evidence before the Commission in this case, the plaintiffs were not entitled to urge that as an issue or offer proof on that question.

II

The Railroad Commission of Texas has authority under the Constitution and the statutes of the State of Texas to make and enforce the order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor. Therefore, the trial court erred in holding that the order was not sustained by the provisions of the statutes.

The three-judge District Court decided this case on the theory that the Railroad Commission of Texas did not have the authority under the Constitu-

tion and statutes of Texas to make and enforce the order in question. We think the court was clearly in error in so holding. We will show that the Commission had unquestionable authority to pass and enforce this order, and in showing this we will prove the following:

(a) The Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses. (Article X, Section 2, Constitution of Texas.)

(b) The Legislature has passed such a law, and has created the Railroad Commission and conferred on it the authority "to govern and regulate . . . railroads" and "to correct abuses . . . and to prevent . . . abuses in the conduct of their business." (Articles 6445 and 6448, Revised Civil Statutes of Texas)

(c) The Legislature has defined an abuse by saying that "unjust discrimination is . . . prohibited and the following acts . . . shall constitute unjust discrimination. 1. If any railroad . . . shall charge . . . any person . . . a greater or less compensation for any service rendered . . . by it than it charges . . . other persons . . . for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person . . . or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever," (Article 6474, Revised Civil Statutes of Texas)

(d) The order in question is the correction of an abuse of the kind defined by the Legislature (described in paragraph (c) above) and, the Legislature having authorized the Railroad Commission to correct such abuses, said order of the Railroad Commission is valid.

Stated briefly in other words, we will show that by a provision of the Constitution of the State and an act of the Legislature the Railroad Commission of Texas has authority to regulate railroads and correct abuses, and that this is an order regulating railroads and correcting an abuse, and that the abuse it corrects has already been defined by the Legislature.

Article X, Section 2, of the Constitution of Texas, was adopted by a vote of the people in 1890, and it is still in effect, and reads as follows:

> "Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers. The Legislature shall pass laws to regulate railroad, freight and passenger tariffs, *to correct abuses* and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable." (Italics ours.)

In 1891, the Legislature of Texas created the Railroad Commission of Texas consisting of three men (General Laws of Texas, 22nd Legislature, 1891, p. 55. Now Chapter Eleven, Title 112, Revised Civil Statutes of Texas.) However, it has been held by the Supreme Court of Texas that the powers of the Railroad Commission are not derived from Article X, Section 2, of the State Constitution, but that the Railroad Commission is a creature of statute and does not derive its power from the Constitution, and that the Legislature could confer on it "governmental duties and functions" not mentioned in said Article X, Section 2. In fact, the Legislature has passed statutes giving the Railroad Commission authority over matters not mentioned in the Constitution of Texas, and not even connected with railroads; and the Supreme Court of Texas held these statutes valid. In the case of *City of Denison* v. *Municipal Gas Company*, 117 Tex. 291 (Supreme Court of Texas, 1928), the act of the Legislature authorizing the Railroad Commission to regulate gas production (known as the Cox Act) was attacked as not being authorized by Article X, Section 2, or by any other provision of the State Constitution, and the court held that the Legislature had authority to permit the Railroad Commission to regulate utilities in regard to matters other than those mentioned in the State Constitution, and the court said:

> "In view of the wording of section 2, art. 10, the amendment definitely provided a constitutional grant and authority for these powers to be exercised by a body or agency other

than the Legislature itself, and solved the vexing question which had agitated the minds of the statesmen of the Legislature and the state, that the Legislature was required to do and perform these duties by its own actions.

"The fact that it makes certain that means and agencies of government with powers to fix and regulate rail rates and prevent abuses, etc., may be created *by law*, does not create a body over which the jurisdiction of the law-making body is limited to the making of rates and matters pertaining to railroads. It was made certain that the Legislature could create agencies with such powers, and that the agencies so created could exercise those powers; but there is nothing in the amendment to section 2, art. 10, that ever remotely indicates that a body known as a Railroad Commission is created thereby, or that such agencies as may be created by the Legislature shall be limited in jurisdiction to powers pertaining only to railroads. (Italics theirs)

"If it be admitted and assumed that the amendment to section 2, art. 10, is mandatory —that is, *that it is made the imperative duty of the Legislature to create means and agencies* which should exercise the powers and functions granted, it cannot be said with any reason that it thereby itself created such agencies, or that it created what was called, and is now known as, the Railroad Commission of Texas, or that this provision even directed or commanded the Legislature to create this particular body. Even if we construe the words used, 'May provide and establish,' as mandatory, yet we are bound

to construe their clear meaning to be that the Legislature 'may provide and establish . . . . means and agencies . . . as may be deemed adequate and advisable' *by it.* (Italics theirs) *We will not strain them to mean a limitation upon the Legislature to limit such agency or any agency to the exercise of powers pertaining only to railroads.* (These italics ours.)

". . . . The Constitution gives such broad latitude to the Legislature as to how it shall effect and accomplish the objects and purposes named that *we are constrained to hold that these provisions do not so limit these means and agencies to exclusively railroad matters as to prohibit the Legislature from referring to them other governmental duties and functions.*" (Italics ours)

There can be no question that the Legislature of Texas has the power to authorize the Railroad Commission to regulate the operation of sleeping cars in the manner it has endeavored to regulate them in this case. The remaining question is whether or not it has so authorized the Railroad Commission.

The Legislature of Texas has authorized the Railroad Commission *to correct abuses* and *to prevent abuses in the conduct of their (railroad's) business.* Article 6445, Revised Civil Statutes of Texas, was originally passed by the Legislature in 1911 (Senate Bill 169, 32nd Legislature, 1911, p. 157), and changed slightly in wording in the recodification of 1925 (adopted by 39th Legislature, 1925), and now reads as follows:

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations and corporations, private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property to fix, and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads, persons, associations and corporations, and to fix divisions of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, *and to prevent any and all other abuses in the conduct of their business* and to do and perform such other duties and details in connection therewith as may be provided by law." (Italics ours)

Article 6448, Revised Civil Statutes of Texas, was originally passed as a part of the act creating the Railroad Commission in 1891 (General Laws of Texas, 22nd Legislature, 1891, p. 55), and changed slightly in wording in the re-codification of 1925 (adopted by 39th Legislature, 1925) and now reads in part as follows:

"The Commission shall:

"1. Adopt all necessary rates, charges and regulations, to govern and regulate freight and passenger traffic, to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger freight on the different railroads in this State."

Thus, we see that the two above quoted statutes, to wit, Articles 6445 and 6448, authorize the Railroad Commission to correct abuses in the conduct of their (railroad's) business. In commenting upon said Article 6448 (which was formerly numbered 4562) the Supreme Court of Texas in the case of *Railroad Commission* v. *Galveston Chamber of Commerce*, 105 Tex. 101, said:

"It is apparent that it was the purpose of the Legislature to confer upon the Railroad Commission ample powers and a liberal discretion over this important matter. Indeed, the character and importance of the business of transportation of freight and passengers in the extensive and varied territory placed under the control of the Commission could not be successfully handled by fixed rules of law. The varied interests to be served and the many difficulties to be overcome, as well as conflicting interests to be properly adjusted demanded flexible rules. The Railroad Commission was constituted an independent department of the government which should represent the interests of the people and the railroads, and to the accomplishment of that purpose the courts will contribute a just and liberal interpretation of the law."

We will now take up the question of whether or

not the order in question deals with an abuse (of the kind the Railroad Commission is authorized to correct), and whether or not said order is a correction of said abuse. We submit that said order corrects an abuse that has already been declared an abuse by the State Legislature in Article 6474, Revised Civil Statutes of Texas, which reads in part as follows:

> "Unjust discrimination is hereby prohibited and the following acts or either of them shall constitute unjust discrimination.
>
> "1. If any railroad subject hereto . . . shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from other persons, firms or corporations for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever.
>
> ". . . .
>
> "4. Penalty.—Any railroad company guilty of unjust discrimination as hereinbefore defined shall for each offense pay to the State of Texas a penalty of not less than five hundred dollars nor more than five thousand dollars."

It is true that said Article 6474 does not use the word "abuse", but it imposes a duty on the railroads and

that duty is that they shall not charge any person a greater or less compensation for any service rendered by it than it charges other persons for doing a like service, or "give any undue or unreasonable preference or advantage to any particular person . . . or locality"; and it provides a penalty for failing to discharge such duty. The imposition of such a duty on the railroads with a provision for a penalty in case of violation constitutes a sufficient definition of an abuse according to the only Texas appellate court case we can find on the question, to wit, the case of *State* v. *St. Louis Southwestern Ry. Co. of Texas*, 165 S. W. 491, by the Texas Court of Civil Appeals, Third District. That was a case in regard to the providing of depot facilities, and the court said:

> "The Constitution empowers the Legislature to correct abuses, and this power may be delegated to the Railroad Commission. Section 2, art. 10. But the commission is not authorized to enact a law declaring what shall constitute an abuse. This can be done only by the Legislature . . . 'a disregard of a duty' imposed by legislative enactment is an abuse. This is admitted by appellees, as will appear from the following excerpt from their brief: 'It is clear that, if the Legislature should, by express enactment require a thing to be done, and then provide that failure to do it should constitute an abuse, there could be no question of the sufficiency of the definition.' It is not necessary that the Legislature should use the word 'abuse'. *It is sufficient that it has by law imposed a certain duty on railroads, and provided a penalty for failing to discharge such duty.*"

(Italics ours)

The foregoing discussion shows (a) that the Legislature has the power to correct abuses, (b) that it has created the Railroad Commission and authorized it to correct abuses, and (c) that it has defined in Article 6474 as an abuse an act whereby a railroad "shall charge . . . any person . . . a greater or less compensation for any service rendered . . . by it than it charges . . . other persons . . . for doing a like . . . service, or shall give any undue or unreasonable preference or advantage to any particular person . . . or locality." *Now, if the order in question is designed to correct the kind of "abuses" that are defined in said Article 6474 then the order is autorized by the statutes of the State of Texas.* We will now discuss whether or not the order in question is designed or intended to correct the "abuses" designated in said Article 6474.

Article 6474 says that a railroad shall not "give any undue or unreasonable preference or advantage to any particular person . . . or locality." The order in question recites that the Commission heard evidence and found that seventeen operations (runs) operate Pullman cars without Pullman conductors and that all other runs have Pullman conductors in charge of the Pullman cars, and "that the failure to have Pullman conductors on the seventeen operations is a discrimination against the passengers who ride on those particular runs in that all other operations of Pullman cars do have Pull-

man conductors; that in every instance the same rates and fares are exacted by the Railroad Companies and the Pullman Company and in one instance the services of a Pullman conductor are offered and in the other instances, namely, the seventeen operations, such services are not rendered"; and the order further recites "the failure on the part of the railroad companies and that of the Pullman Company to thus provide such service and protection to such passengers is an abuse, a disadvantage and an undue and unjust discrimination against all passengers who ride on any one or more of said seventeen operations where Pullman conductors are not used." Thus, we see that the order is designed and intended to correct one of the abuses defined in Article 6474. We cannot conceive how it would have been possible to have come any closer to making a finding of facts that constitute an abuse within the meaning of Article 6474 than was done in this order.

When a railroad company operates a Pullman car that is in the charge of a Pullman conductor on some of its lines, and operates Pullman cars without a Pullman conductor on other lines, that is clearly giving a "preference" and an "advantage" to the passengers who ride on the Pullman car on which there is a Pullman conductor, and it is likewise giving a "preference" to the localities through which the lines operate that have Pullman cars with Pullman conductors. In other words, the passengers who ride on the different lines pay the same fare, but some of them receive the services of a conduc-

tor and are given the comfort and safety that is assured by the presence of a conductor, but the persons riding on the other lines do not receive such benefits or safety or comfort. It is clearly an "unjust discrimination" as defied in said Article 6474, and therefore it constitutes an "abuse" and can be prohibited by the Railroad Commission.

Suppose, for example, that a railroad operated passenger coaches over some of its lines without heating them in cold weather, but on other lines it properly heated them. As another example, suppose that a railroad operated its sleeping cars on some lines without wash-room facilities, but operated those on its other lines with proper wash-room facilities. Both of said examples clearly constitute a discrimination, and therefore an abuse, just the same as the facts as found by the Commission in this case constitutes a discrimination and an abuse under Article 6474.

We must not overlook that part of Article 6474 which says that it is an unjust discrimination "if any railroad . . . , directly or indirectly, . . . , shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from other persons, firm or corporation for doing a like and contemporaneous service." Transportation obviously involves more than the mere hauling of a person from one place to another. The arrangements made for a passenger's comfort compose a large part

of the consideration for the fare which he has paid. Compare the situation of a man riding in a flat car unattended by a conductor or a porter with that of the passenger on an ordinary passenger train. If he has been charged $6.00 for riding from Austin to Dallas it is obvious that he is paying more for what he is getting, i. e., bare transportation, than is the man who pays $6.00 to go from Austin to Dallas, but who sits in a plush seat and is attended by a porter and a conductor. The extent that one gets more service and comforts than the other is the exact extent that the other receives less for his money, and and therefore pays more for what he gets. Translating it to the facts in this case: one man gets a Pullman seat and berths, and he is attended by both a porter and a Pullman conductor, while another man paying the same mileage or compensation gets the Pullman seat and berth, and is attended by a porter, but is minus the services of the Pullman conductor. He receives less for his money than does the other. Correspondingly, the railroad has collected from him a greater compensation for the services rendered him than it has collected from the other person. We submit that this falls squarely within the "unjust discrimination" defined in sub-division 1 of said Article 6474.

There are no Texas appellate court cases involving this statute that have the same facts that we have in this case, but we are not without some authority. In the case of *G. C. & S. F. Ry. Co.* v. *State*, 169, S. W. 385, by the Texas Court of Civil Appeals,

Third District, (which was affirmed by the Supreme Court of the United States in the case of *G. C. & S. F. Ry. Co.* v. *Texas*, 246 U. S. 58) the Railroad Commission of Texas had ordered that two particular trains stop at the town of Meridian, Texas, each day. The facts showed that the railroad company stopped other trains at this town, but these two trains were the only trains with sleeping (Pullman) cars in them, and one of the reasons on which the order was based was that the people of that town did not have sleeping car service like other towns through which this company operated, such as the town of Clifton; and in upholding the Railroad Commission's order the court said:

> "It is no answer to this to say that the companies are not required to furnish sleeping car accommodations. This may be conceded; yet, when they do furnish such accommodations to a part of the public, then we think they are required to furnish the same to all others, ... We think the court was justified in finding that adequate facilities were not afforded by appellant to the citizens of Meridian, when it failed to stop the only two trains furnishing sleeping car accommodations in and out of said town."

The Supreme Court of Texas had previously made a similar holding in the case of *H. & T. C. Ry. Co.* v. *J. L. & L. P. Smith*, 63 Tex. 322, decided in 1885. At that time, Article X, Section 2 of the State Constitution provided as follows:

> "Railroads heretofore constructed, or that

may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. *The Legislature shall pass laws to correct abuses* and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state; and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties." (Italics ours)

In construing that provision the Supreme Court of Texas said:

"The leading idea, and the one that seems most prominent in our legislation upon the subject under consideration, is that of equality. Railroads are declared public highways, and railroad companies common carriers, by the constitution. It is also declared by the constitution that the legislation shall pass laws to correct abuses and prevent unjust discriminations, etc. Art. X, sec. 2, Constitution.

"*These railroad companies derive their chartered rights from the state; and they owe an equal duty to each citizen.* Having secured from the state extraordinary rights and privileges, *they ought not to be permitted to exercise them in such manner as to benefit one individual, town or community to the detriment of another.* In the exercise of the duties which relate to the public, *these companies must, upon general principles, deal alike with all customers.*" (Italics ours)

That case shows clearly that as early as 1885 the Supreme Court of Texas construed the words "correct abuses and prevent unjust discrimination" to mean that the railroads could be compelled to "deal alike with all customers."

Some light is shed on this question by the cases of *Railroad Commission of Texas* v. *H. & T. C. Ry.*, 90 Tex. 345, and *I. & G. N. Ry. Co.* v. *Railroad Commission of Texas*, 99 Tex. 332, both by the Supreme Court of Texas, and the legislation that followed as a result of those cases. The H. & T. C. Ry. Co. case was decided in 1897, prior to the passage of the present Article 6445 and Article 6448. In that case the Railroad Commission of Texas had made an order requiring all railroad companies to compress at the nearest compressing plant all cotton delivered for shipment, and the H. & T. C. Ry. Co. sought to enjoin the enforcement of the order on the ground that the Commission had no authority to pass it. The Supreme Court of Texas found that this matter was an abuse defined by statute, to-wit, Article 6474 (which was then Article 4574) in that it was an abuse for a railroad to haul one man's cotton compressed and to haul another man's cotton uncompressed; and, although Articles 6445 and 6448 were not in existence in their present words at that time, the court found that the Commission was authorized to prevent abuses by virtue of Article 4562, which at that time read:

> "The power and authority is hereby vested in the Railway Commission of Texas . . . to

adopt all necessary rates, charges and regulations, govern and regulate freight and passenger *tariffs*, the power to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger *tariffs* . . ." (Italics ours)

Basing its opinion on the then existing Article 4562 (quoted above), and on Article 6474 (which was then Article 4574), the court said:

" . . . *we hold that the power here conferred by the Legislature upon the commission empowers it to correct abuses other than those which may be corrected with the rates of freight and passenger tariffs. The question, then, arises, what abuses can the railroad commission correct?* We think that it must be some abuse which has been defined by the law, and that the commission would not, by this power, be authorized to enact a law defining what is an abuse or a disregard of duty on the part of a railroad corporation. Has the legislature of Texas defined any act or acts as an abuse on the part of the railroad companies under which the commission would have power, in the suppression or correction thereof, to adopt the regulations in question? Article 4574, subd. 1, Rev. St., is in this language: 'It shall also be an unjust discrimination for any such railroad to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever.' We think that the railroad companies, in transport-

> ing cotton, might give undue and unreasonable preference or advantage to some particular person, company, firm, corporation, or locality, or might subject the cotton to undue and unreasonable delay, and that the regulations prescribed by the commission would be necessary to correct and prevent such abuses." (Italics ours)

The I. & G. N. Ry. Co. case *(I. & G. N. Ry Co.* v. *Railroad Commission of Texas, supra)* was decided in 1905. In that case the Supreme Court of Texas discovered for the first time that the title (caption) to the act of the Legislature embodying said Article 4562 (quoted above) was defective in that it did not refer to anything but rates; and as the Constitution of Texas requires that the title of an act refer to everything covered by the body of the act it was incumbent upon the court to hold that said Article 4562 did not include any abuses except rate matters. The court did not set aside its reasoning in the H. & T. C. Ry. Co. case (90 Tex. 345), but only revised its construction of said Article 4562 and limited it to abuses on rate matters; and the court said:

> "If this provision (Art. 4562) was intended to confer upon the commission the independent power to correct any abuse 'which has been defined by law,' then as we think, we should be constrained to hold the enactment, so far as it attempted to confer that power, invalid, because it was not expressed in the title of the original act. . . . The matter of correcting abuses is nowhere mentioned. . . . The question of the constitutionality of the part of the act then

> under consideration was not certified to us in that case, nor was it alluded to in the argument. Hence, it was not considered. . . .
>
> ". . . We have not without difficulty reached the conclusion, that since the correction of abuses is not mentioned in the title of the act, if the provision admitted only of the broad construction that it applied to every abuse we should hold that in so far it was void. But it is a familiar rule of the construction of statutes, that if an act be capable of two constructions—one of which is not consistent with the Constitution and the other of which is not in conflict with that instrument, the latter must prevail . . . Under this restricted construction, the provision is constitutional. . . "

Shortly after the I. & G. N. Ry. Co. case, which limited the correction of abuses by the Railroad Commission of Texas to rate matters, because of the defective title of the original act, the Legislature passed a new act, which was Senate Bill 169, 32nd Legislature, Acts 1911, p. 157 (which is copied in full and marked Exhibit "C" in the appendix of this brief); and we contend that it passed said Senate Bill 169 as a result of the crippling of the right of the Railroad Commission to correct abuses, and that the Legislature passed it for the direct purpose of giving the Railroad Commission statutory authority to correct abuses other than rate abuses, to-wit, abuses like the one in question in the case now before the court. We call the court's attention to the fact that Section 1 of the bill (which is the present Article 6445) enumerated the abuses the Railroad

Commission could correct, and then it concluded with an all-inclusive clause as follows:

> ". . . and to correct and prevent any and all other abuses in the conduct of their business."

We also call to the court's attention that Section 7 of the bill said:

> "That the fact that there is no adequate law for the regulation of such . . . corporation, and the urgent necessity for such law, creates an emergency. . ."

We submit that said Senate Bill 169 (which included the present Article 6445) was specifically passed to give the Railroad Commission authority to correct abuses like the one in question, and that *it did give such authority.*

Another significant change that we wish to call to the court's attention is that in 1925, when the Legislature of Texas adopted a new recodification of the civil statutes, Article 6448 came into existence in its present words for the first time. Prior to that time, Section 1 of the article similar to the present Article 6448, used the word "tariff," and now Article 6448 uses the word "traffic." We believe this is a significant change in the wording of that article. We believe that Article 6448 authorizes the Railroad Commission to correct abuses other than rate abuses, and that Article 6445 likewise authorizes the Railroad Commission to correct abuses other than rate abuses. Both articles, so far as their present

wording is concerned, have been passed by the Legislature since the authority of the Railroad Commission to correct abuses other than rate abuses was crippled by the opinion in the I. & G. N. Ry. Co. case (99 Tex. 332); and it is our contention that these two articles were adopted for the prime purpose of curing the defects in the Commission's authority that were raised in that opinion.

We see that Articles 6445 and 6448 authorizes the Railroad Commission of Texas to correct abuses. Article 6474 was merely intended to define as an abuse an act whereby a railroad "shall give any undue or unreasonable preference or advantage to any particular person . . . or locality." We sincerely submit that the Honorable three-judge trial court was in error when it said in its opinion: "There is no Texas statute which forbids the operation of a train, carrying a Pullman car without a Pullman conductor, nor is there any statute that defines such action as an abuse." (R. 362) The court also erred when it said: ". . . it (the order) cannot stand as a correction of an abuse, because the so-called abuse has not been defined or prohiibted by law." (R. 363)

The three-judge trial court apparently decided this case on the theory that only an "unjust discrimination" could be prohibited or corrected. It said: "It will be noted that the statute denounces unjust discrimination"; and it then quoted from the case of *St. Louis Southwestern Ry. Co.* v. *State*, 113 Tex. 570, wherein it construes the meaning of the word

"unjust". It is true that an "unjust discrimination" is prohibited, but the trial court fell into error, as we view it, when it sought to define and construe the term "unjust discrimination" as it understood the term in common usage, because in Article 6474 the term "unjust discrimination" is defined as being a case in which a railroad gives "any undue or unreasonable preference or advantage to any particular person . . . or locality." Therefore, the term having been defined, the court should not have concerned itself with the ordinary meaning of the term, but it should have looked at the definition and determined if the acts that the order seeks to correct come within that definition.

The ultimate question that the court should have decided was this: Does the operation by a railroad of sleeping cars with Pullman conductors on one line and the operation of sleeping cars without Pullman conductors on another line constitute an "undue or unreasonable preference" to the persons who ride the line where there is a Pullman conductor on the sleeping cars, or to the localities through which said line runs, over the persons who ride the line where there is no Pullman conductor on the sleeping cars, or to the localities through which that line runs? The three-judge trial court apparently did not decide that question.

That question calls for deciding whether or not the preference shown between persons and localities by having Pullman conductors on some lines and not

on others was an *undue* or *unreasonable* preference. What is meant by *undue* or *unreasonable?*

Whether or not the preference shown between persons and localities by operating sleeping cars in a different manner (with and without Pullman conductors) on the various lines was *undue* or *unreasonable* is a question of fact to be decided by the Railroad Commission of Texas. Article 6450, Revised Civil Statutes of Texas, reads as follows:

> "The Commission may adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges, and other acts required of it under this law; and no person shall be denied admission at such investigation."

A hearing was held and evidence considered, and after said hearing the Commission made findings of fact and entered the order in question. It found from the evidence that having Pullman conductors on some runs and not having them on other runs constituted an undue discrimination in favor of those lines that had the Pullman conductors. Such a finding cannot be disturbed by a court unless it is unsupported by any evidence. Perhaps the three-judge trial court in this case would have held differently, that is, that the discrimination was not *undue* or *unreasonable*, if it had had the privilege of deciding on the conflict of evidence in the original hearing, but

it did not have that privilege as that was a matter for the Commission to decide. We submit that there was substantial evidence to support the Commission's finding, and therefore it cannot be set aside. We have outlined said evidence in the "statement of the case" above in this brief.

In the case of *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59 (Supreme Court of Texas, 1939), suit was brought against the Railroad Commission of Texas and others to set aside one of its orders granting a permit to drill an oil well, and in commenting on the findings of fact by the Commission the court said:

> ". . . To our minds, the law contemplates that the fact findings made by the Commission in passing upon such applications are subject to review and correction by the courts only to the limited extent hereinafter stated. The court, on appeal from the Commission's order, should not set aside an order of the Commission either granting or refusing to grant a well permit unless such order is illegal, unreasonable, or arbitrary. In so far as the fact findings upon which the order is based are concerned, the order is not illegal, unreasonable, or arbitrary if it is reasonably supported by substantial evidence. Stated in another way, the court does not act as an administrative body to determine whether or not it would have reached the same fact conclusion that the Commission reached, but will consider only whether the action of the Commission in its determination of the facts is reasonably supported by substantial evi-

dence. 34 Tex. Jur., p. 712, sec. 11, and authorities there cited. To permit the court to substitute its fact findings on controverted issues of fact in such instances would add nothing of value to the administration of the law or the rule under discussion, but, to the contrary, would destroy all uniformity of Commission administration thereunder. . . ."

A similar holding was made by this Honorable court in the case of *Manufacturers Railway Co.* v. *United States*, 246 U. S. 456, which was an appeal in a suit to enjoin the enforcement of an Interstate Commerce Commission order. In that case the court said:

"*Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission* (Inter-state Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 170), *and upon which its decisions*, made the basis of administrative orders operating in futuro, *are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.* . . . .

". . . The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different

finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done. . ."

The same holding was made in the case of *Nashville, C. & St. L. Ry.* v. *Tennessee*, 262 U. S. 318, in which the court, speaking through Mr. Justice Brandeis, said:

"Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by §2 and §3) only that discrimination which is unreasonable; undue, or unjust. Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 220; Manufacturers Ry. Co. v. United States, 264 U. S. 457, 481. *Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made as a question of fact, on the matters proved in the particular case. . .*" (Italics ours)

Thus, we see that under the Federal Act to Regulate Commerce, the question of whether or not "a preference or discrimination is *undue, unreasonable* or unjust" is "a question of fact" to be decided by the Interstate Commerce Commission. We sincerely

submit that the same rule applies in the case of the Railroad Commission of Texas in this case. In the very recent case of *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, this Court held that the findings of fact by the Railroad Commission of Texas in a hearing on the regulation of oil production should not be disturbed by a Federal court, where there was evidence on which to base the Commission's findings and order thereon, and this Court said:

> ". . . It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."

III

The order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor, is reasonable and contributes to the safety and welfare of the passengers, and therefore, does not violate the Fourteenth Amendment to the Constitution of the United States.

Although the testimony from the witnesses in this case was conflicting, there was ample testimony to the effect that a Pullman conductor on sleeping cars contributes to the safety and welfare of the passengers. We will not repeat that testimony here, but we call it to the court's attention as narrated in the "statement of the case" (infra p. 12) in this brief. There being substantial evidence to support

the Railroad Commission's findings in the order, the United States District Court has no right to find to the contrary. In the case of *Railroad Commision of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573 (heretofore referred to in this brief), this Court, in discussing an oil proration order of the Railroad Commission of Texas, said:

> ". . . For all we know, the judgment of these two lower courts may have been wiser than that of the Commission, and their standard of fairness a better one. But whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment. . . ."
>
> ". . . .
>
> ". . . . Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts."

Our view is well expressed by the language of this Court in the case of *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, involving an order of the Communications Commission, in which this court said:

> "Having found that the records permitted the Commission to draw the conclusion that it

did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"

The earliest decision we have found that deals with a problem similar to the one we have here is the case of *Trenton Horse Railroad Co.* v. *City of Trenton*, 53 N. J. L. 132, 20 Atl. 1076, decided in 1890 by the Supreme Court of New Jersey, in which it was held that a city ordinance which required that there be a second man, in addition to the team driver, on every horse car, was reasonable and valid.

In the cases of *C. R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453 and *St. L. I. M. & S. Ry. Co.* v. *Arkansas*, 240 U. S. 518, this court upheld the validity of the Arkansas statute which required a crew of an engineer, a fireman, a conductor and three brakemen on all freight trains of more than twenty-five cars operating on railroads fifty miles or more in length. In the C. R. I. & P. Ry. Co. case this Court said:

". . . Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which evidently the state legislature had in view. It is a means employed by the State

> to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object. . . ."

The appellees (plaintiffs) in this case contend that it will work a financial hardship on them if they are required to have Pullman conductors in charge of their sleeping cars, but our answer to that argument is stated in the language of this court in the case of *Chespeake & Ohio Ry. Co.* v. *Public Service Commission of West Virginia*, 242 U. S. 603, as follows:

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. . . . That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered. . . ."

Instead of using our own language as argument

we will use the language of the United States Circuit Court of Appeals, Ninth Circuit, in the case of *City and County of San Francisco* v. *Market Street Ry. Co.*, 98 F. (2d) 628, as follows:

> "The constitutionality of an ordinance of the City and County of San Francisco, requiring street cars while carrying passengers in that city to 'be in charge of a motorman and a conductor' is here involved.
>
> ". . . there was substantial evidence to show that 'one-man' cars are not as safe as the 'two-man' cars. Notwithstanding the strong evidence to the contrary, it was for the legislative body to determine which side it wishes to believe. Our function is ended upon determination that the question was fairly debatable. . . Further, we may not 'set aside the ordinance because compliance with it is burdensome' . . . or that it may lead to bankruptcy.
>
> "No one can question that the City and County of San Francisco was acting within the scope of its authority when it attempted to make safer the human beings in its cars and on its streets from death or injury due to the management and running of its street cars. No one knows better than the Board of Supervisors or the citizens themselves voting upon safety ordinances and dangers to be met and avoided in the crowded areas, the heavy grades, the fog, and the increased automotive traffic. The Supreme Court has repeatedly held that the same rule applies to those seeking to prove the unconstitutionality of municipal safety

ordinances as applies to acts of the Congress or the state legislatures when legislating in their broader areas of responsibility.

"*Judicial notice is taken that the duties of the street car conductor require conducting the passengers into the car, including his assistance of the aged and young children, and crippled and infirm, in safely mounting the steep steps and reaching their seats in the moving vehicle. . . . The conductor also must keep from entering the car intoxicated or violently acting persons who may do injury to other passengers.* If such persons have gained entry and cause disorder, it is the conductor's duty to restore order and, if necessary, eject the offender.

"It therefore appears that not only has the Railway not shown that the ordinance of 1935 is based on no fact from which may be drawn a rational inference that it contributes to the safety of street car traffic, but that the two-man requirement affirmatively appears to be reasonable." (Italics ours)

There was *substantial* evidence in this case showing that the presence of Pullman conductors on sleeping cars contributed to the safety of the passengers, that they kept order on the cars, including the handling of intoxicated persons and the prevention of misconduct by passengers, that they supervised the sanitation of the sleeping cars and operated the heating and cooling systems and cared for the aged and infirm persons and children placed in their care, that the porters were occupied with other

matters such as the making up of the beds, the sweeping of the floors and the care of the baggage, and that the train conductor was usually so occupied in the front part of the train that he could not devote any time or attention to the care or supervision of the Pullman cars. We sincerely contend that because of said facts the order in question does not violate the Fourteenth Amendment.

IV

The order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor, and the enforcement thereof, does not unlawfully interfere with interstate commerce and it does not violate the interstate commerce provision of the Constitution of the United States.

Under the holdings of this court the enforcement of this order does not unlawfully interfere with interstate commerce. A state in the exercise of its police power for the protection of the people has a right to adopt laws and regulations requiring that railroads and other public utilities comply with certain requirements, if those requirements contribute to the safety and welfare of the people, even though laws and regulations apply in some instances to commerce between the states. Just because the matter regulated is a part of an interstate commerce transaction is no reason why the business can be conducted haphazardly and in disregard of the

state's laws that have been passed to make that business safe for the people concerned.

In the case of *C. R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453, (heretofore referred to in this brief) the Arkansas statute that required a freight train crew of six men in certain cases was attacked as being unconstitutional on the ground that its enforcement interferred with interstate commerce. This court overruled such contention and said:

> "It is not too much to say that the state was under an obligation to establish such regulations as were necessarily reasonable for the safety of all engaged in the business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the state. Local statutes directed to such an end have their sources in the power of the state, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a federal court unless they are clearly inconsistent with some power granted to the general government, or with some rights secured by that instrument, or unless they are purely arbitrary in their nature. The statutes here involved is not in a proper sense a regulation of interstate commerce nor does it deny the full protection of the law. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction of such commerce,

and for the protection of those engaged in such commerce."

We submit that that case is directly in point with the case under submission.

In the case of *Missouri Pacific Railroad Company* v. *Norwood*, 283 U. S. 249, this court again held that the Arkansas statute requiring a six man crew on freight trains in certain cases was valid and that the enforcement thereof did not interfere with interstate commerce.

In the case of *Smith* v. *Alabama*, 124 U. S. 465, this court held that the enforcemnt of a state law requiring all locomotive engineers to be examined and licensed by a board did not constitute an unlawful interference with interstate commerce in the case of a railroad operating between states, and it said:

"It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a state, and by the authority of its laws, that ordinarily by means of corporations exercising their franchises by limited grants from the state. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state. Their operation requires the use of instruments and agencies attended with special risks and dangers, proper management of which involves peculiar knowledge, training, skill, and

care. The safety of the public in person and property demands the use of specific guards and caution. * * * The rules prescribed for their construction and for their management and operation, designed to protect person and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not per se regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.

"In conclusion, we find, therefore, first, that the statutes of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the states to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the states, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particular interest in which it touches those transactions at all, it is not in conflict with any expressed enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

Other cases dealing with the interstate commerce question and that support our contention are the following: *C. M. & St. P. Ry. Co.* v. *Sloan*, 169 U. S. 133; *Atlantic Coast Line Railroad Co.* v. *Georgia*, 234 U. S. 280; and *A. T. & S. F. Ry. Co.* v. *Railroad Commission of California*, 283 U. S. 380.

We sincerely submit that the enforcement of the Railroad Commission's order in this case does not constitute an unlawful interference with interstate commerce.

V

As there was statutory authority for the making of the order in question, and as said order was reasonable and did not violate the Fourteenth Amendment, the trial court erred in granting a "blanket" injunction in behalf of all of the plaintiffs covering all lines, because the facts showed that the situation of each plaintiff and each line was different and that possibly some of the plaintiffs were entitled to an injunction but that the other plaintiffs were not entitled to such relief, and because the facts further showed that the plaintiffs who possibly had a cause of action had not applied to the Commission, as provided in the order, for a modification of the order as applied to them. The evidence showed that some of the lines and runs were entirely within the State of Texas, but that a few of the other lines and runs crossed over into other states; and the evidence showed that the traffic was heavier and required a Pullman conductor more in the case of some lines

and runs than in the case of other lines and runs.

The order provided specifically that if "it be the desire of any railroad company, receiver or trustee to operate over its line of railway a sleeping car or cars without fully complying with the provisions of the orders, * * * the Commission shall be notified and its consent secured before such change or deviation from the terms of said orders is put in force." The record in this case shows that no such consent was received by any of the plaintiffs (appellees).

We have not found any appellate court case dealing with a situation of this kind except the case of *Henderson* v. *Terrell*, 24 Fed. Sup. 147, (heretofore referred to in this brief) in which Circuit Judge Hutcheson wrote the opinion of the court. That was a case in which an attack was made on the validity of an order of the Railroad Commission of Texas limiting the production of gas in an area known as the "panhandle field." As argument in this case we will quote from the language of that opinion as follows:

> "Plaintiffs made no showing that they had applied to the Commission for relief, either general or as to the particular wells they claimed water damage to. Not only is it in general their right to apply to the Commission for relief from particular inequities in any of the orders, but the orders in question make provision for their doing so.
>
> "We can but assume that if they applied

to the Commission for relief as to these particular wells, such exception will be made as to them, if their proof shows it necessary, as will prevent their being injured. Before us the evidence on the point is greatly conflicting. Plaintiffs' evidence, if believed, shows that the reduction as applied to these wells, is too great for safety. The defendant's evidence is equally positive that it is not. Indeed, the showing we make here is that actual operations under the reduction have shown that no injury has occurred or will occur. Plaintiffs not having applied to the Commission for relief as to these wells, we do not find it necessary to make a determination as to this question. We must assume that the relief will not be denied upon plaintiffs' application, if they can show the existence of the conditions claimed."

An examination of the record in this case shows that there were seventeen different lines of railroads involved in this law suit; that some of them were in the dry western part of the State and others were in the wet coastal plain region; that some of them served the thickly populated sections of the State and others were operated in sparsely populated areas; that some of the railroads in question crossed the State line while others were operated entirely within the State, and that the traffic on some of said lines was heavy while that on other lines was comparatively light. The conditions of each line were different. Each plaintiff that thought that its line should not be subject to the terms of the order should have made application for an exemption. Having failed to do so, they were not entitled to come into a

Federal Court *en masse* and obtain a blanket injunction enjoining the enforcement of the order in respect to *everybody* in *every place* at *every time*.

CONCLUSION

For the reasons stated it is sincerely contended, and these appellants respectfully pray, that the judgment of the District Court for the Western District of Texas be reversed.

Respectfully submitted,

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All of Austin, Texas.

Attorneys for Appellants, Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, Jerry Sadler and Gerald C. Mann.

The attorneys for the original plaintiffs (appel-

lees) in this case are Ireland Graves, Lowell M. Greenlaw, Herbert S. Anderson and Claude Pollard. The attorney for the intervening plaintiffs (also appellees) is Ireland Graves. The attorneys for the intervening defendants (also appellants) are Cecil A. Morgan and A. B. Culbertson. A copy of this brief has been delivered to each of said attorneys.

APPENDIX

Exhibit "A"

TEXAS CONSTITUTIONAL PROVISIONS RELEVANT TO THIS APPEAL

Article X, Section 2, Constitution of the State of Texas:

> "Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers. The Legislature shall pass laws to regulate railroad, freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable."

Exhibit "B"

TEXAS STATUTES RELEVANT TO THIS APPEAL

(All statutes listed below are included in Texas Revised Civil Statutes, 1925, or amendments thereto, and are compiled in Vernon's Annotated Civil Statutes of Texas.)

Article 6260:

"Art. 6260. Who may build

"No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or maintain any railways within State."

Article 6416:

"Art. 6416. Passenger fare

"The passenger fare upon all railroads in this State shall be three cents per mile, with an allowance of baggage to each passenger not to exceed one hundred pounds in weight; provided, however, that, where the fare is paid to the conductor, the rate shall be four cents per mile, except from stations where no tickets are sold, and that the minimum charges in no case shall be less than twenty-five cents; and provided, further that when the passenger fare does not end in five or naught, the nearest sum so ending shall be the fare; provided, that in no case shall children under ten years of age be charged a higher rate of fare than two cents per mile. Railroads shall be required to keep their ticket offices open for half an hour prior to the departure of trains, and upon failure to do so they shall not charge more than three cents per mile."

Article 6444:

"Art. 6444. Terms defined

"The term 'Commission' as used in this title means the Railroad Commission of Texas, and the term 'Commissioners' means the members of the Railroad Commission of Texas."

Article 6445:

"Art. 6445. Power and authority

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations and corporations, private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property to fix, and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads, persons, associations and corporations, and to fix division of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law."

Article 6446:

"Art. 6446. Power to enforce rules, etc.

"The Railroad Commission of Texas is hereby vested with full power and authority to do and perform each act and duty authorized, directed or imposed upon it by the provisions of this title, and all railroads, persons, corporations, and associations subject to the control of the Commission shall be subject to the penalties prescribed by law for failure to comply with the rules, orders, directions or requirements of said Commission as severally provided in this title."

Article 6447:

"Art. 6447. The Commission

"Election.—The Railroad Commission of Texas shall be composed of three members, one of whom shall be elected biennially at each general election for a term of six years.

"Qualifications.—The members shall be resident citizens of this State, and qualified voters under the Constitution and laws, and not less than twenty-five years of age. No member shall be directly or indirectly interested in any railroad, or in any stock, bond, mortgage, security or earnings of any railroad, and should a member voluntarily become so interested his office shall become vacant; or should he become so interested otherwise than voluntarily, he shall within a reasonable time divest himself of such interest; failing to do this, his office shall become vacant.

"Shall hold no other office, etc.—No railroad commissioner shall hold any other office of any character, while such commissioner, nor engage in any occupation or business inconsistent with his duties as such commissioner.

"Oath, etc.—Before entering upon the duties of his office, each commissioner shall take and subscribe to the official oath and shall in addition thereto, swear that he is not directly or indirectly interested in any railroad, nor in the bonds, stock, mortgages, securities, contracts or earnings of any railroad, and that he will to the best of his ability faithfully and justly execute and enforce the provisions of this title, and all laws of this State concerning railroads, which oath shall be filed with the Secretary of State.

"Organization.—The commissioners shall elect one of their number chairman. They may make all rules necessary for their government and proceedings. They may appoint a secretary at a salary not exceeding $2,000.00 per annum, and not more than two clerks at salaries not exceeding $1,500.00 per annum each, and such other experts as may be necessary. They shall be known collectively as the 'Railroad Commission of Texas,' and shall have a seal, a star of five points with the words 'Railroad Commission of Texas' engraved thereon. They shall be furnished with an office at the Capitol, and with necessary furniture, stationery, supplies and all necessary expenses, to be paid for on the order of the Governor.

"Secretary's duties.—The secretary shall

keep full and correct minutes of all the transactions and proceedings of the Commission, and perform such duties as the Commission may require of him.

"Expenses.—The Commissioners and their employes shall receive from the State their actual necessary traveling expenses while traveling on the business of the Commission, which shall include the cost only of transportation while traveling on business for the Commission, upon an itemized statement thereof, sworn to by the party who incurred the expense, and approved by the Commission.

"Sessions.—The Commission may hold its sessions at any place in this State when deemed necessary."

Article 6448:

"Art. 6448. Duties

"The Commission shall:

"1. Adopt all necessary rates, charges and regulations, to govern and regulate freight and passenger traffic, to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger traffic on the different railroads in this State.

"2. Fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this State into such general and special classes or subdivisions as may be found necessary

and expedient.

"3. Fix to each class or subdivision of freight a reasonable rate for each railroad subject to this title for the transportation of each of said classes and subdivisions. Such classifications shall apply to and be the same for all railroads subject to the provisions of this chapter. It may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines if found necessary to do justice, and may make rates for express companies different from the rates fixed by railroads.

"4. Fix and establish for all or any connecting lines of railroads of this State reasonable joint rates of freight charges for the various classes of freight and cars that may pass over two or more such lines of such railroads.

"5. When two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers or cars over their lines, fix the pro rata part of the charges to be received by each connecting line.

"6. From time to time alter, change, amend or abolish any classification or rate established by it when deemed necessary. Such amended, altered or new classifications or rates shall be put into effect in the same manner as the originals.

"7. Adopt and enforce such rules, regulations and modes of procedure as it may deem

proper to hear and determine complaints against the classifications or the rates, the rules, regulations and the determinations of the Commission.

"8. Make reasonable and just rates of charges for each railroad subject hereto for the use or transportation of loaded or empty cars on its road and may establish for each railroad or for all railroads alike, reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty-eight hours' notice to the consignee, not to include Sundays and legal holidays.

"9. Make and establish reasonable rates for the transportation of passengers over each railroad subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject hereto.

"10. Require each railroad subject to this title to provide and maintain adequate, comfortable and clean depots and depot buildings at its several stations for the accommodation of passengers; and to keep them well-lighted and warmed for the comfort and accommodation of the traveling public; and keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freight handled by such roads and such railways, and to obey the requirements of the Commission in respect thereto.

"11. See that all laws of this State concern-

ing railroads are enforced and that violations thereof are promptly prosecuted and penalties due the State therefor are recovered and collected; and report all such violations with the facts in its possession to the Attorney General or other officer charged with the enforcement of the law. It shall investigate all complaints against all railroad companies. Suits between the State and a railroad shall have precedence in the courts."

Article 6449:

"Art. 6449. Notice

"Before any rates shall be established, the Commission shall give each railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place; and it shall have process to enforce the attendance of its witnesses, which shall be served as in civil cases."

Article 6450:

"Art. 6450. Rules for hearing, etc.

"The Commission may adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of railroad companies. and other parties before it, in the establishment of rates, orders, charges, and other acts required of it under this law; and no person shall be denied admission at such investigation."

Article 6451:

"Art. 6451. May administer oaths, etc.

"Each Commissioner, for the purposes mentioned in this chapter, shall have power to administer oaths, certify to all official acts, and to compel the attendance of witnesses, and the production of papers, waybills, books, accounts, documents and testimony, and to punish for contempt as fully as is provided by law for the district court."

Article 6452:

"Art. 6452. Rates conclusive

"In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by the Commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair, and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for the purpose in the manner prescribed by the two succeeding articles."

Article 6453:

"Art. 6453. Appeal

"If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or

regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the Appellate Court having jurisdiction of said cause; and said appeal shall be at once returnable to said Appellate Court at either of its terms; and said action so appealed shall have precedence in said Appellate Court of all causes of a different character therein pending; provided, that, if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice. Provided further that no preliminary injunction shall be issued without notice to the opposite party and that no temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be enforced with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparably (irreparable) and why the order was granted without notice, and shall by its terms expire within such time after

entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require."

Article 6454:

"Art. 6454. Burden of proof

"The burden of proof shall rest upon the plaintiff to show the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

Article 6471:

"Art. 6471. Witnesses

"In any examination or investigation provided in this chapter, the Commission is authorized and empowered to compel the attendance of witnesses, and may issue subpoenas for witnesses by such rules as they may prescribe, and such process shall be served by the officer to whom it may be directed. Each witness who shall appear before the Commission by order of the Commission, at a place outside the county of his residence, shall receive for his attendance one dollar per day and three cents per mile traveled by the nearest practical route, in going to and returning from the place of meeting of the Commission, which shall be paid by the Comptroller upon the presentation of proper vouchers sworn to by the witness, and approved by the Commission. No witness shall be entitled to fees or mileage who is directly or indirectly interested in a railroad, or who is in anywise interested in any stock, bond, mortgage, security or earnings of such road, or was an officer, agent or employe of such road when summoned at the instance of such railroad. No witness furnished with free transportation shall receive pay for the distance he may travel on such free transportation. The Commission may issue an attachment as in civil cases, for a witness who fails or refuses to obey a subpoena, and compel him to attend before the Commission and give his testimony upon such matter as shall be lawfully required by them. If a witness, after being duly summoned, shall fail or refuse to attend or to answer any question propounded to him, and which he would be required to answer if in court, the Commission may fine and imprison such witness for contempt, in the same manner that a judge of the district court

might do under similar circumstances. The claim that any such testimony might tend to criminate the person giving it shall not excuse a witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Article 6473:

"Art. 6473. Extortion

"If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand or receive a greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than one hundred nor more than five thousand dollars."

Article 6474:

"Art. 6474. 'Unjust discrimination'

"Unjust discrimination is hereby prohibited and the following acts or either of them shall constitute unjust discrimination.

"1. If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than its charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever.

"2. If any railroad company shall fail or refuse, under regulations prescribed by the Commission, to receive and transport without delay or discrimination the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as the Commission may prescribe, fail or refuse to transport and deliver without delay or discrimination any passengers, tonnage or cars, loaded or empty, destined to any point on or over the line of any connecting line of railroad; provided perishable freights of all kinds and live stock shall have precedence of shipment.

"3. If any railroad company shall charge or receive any greater compensation in the aggregate for the transportation of like kind of property or passengers for the shorter line than for a longer distance over the same line; provided, that upon application to the Commis-

sion any railroad may in special cases, to prevent manifest injury, be authoriezd by the Commission to charge less for longer than for shorter distances for transporting persons and property, and the Commission shall, from time to time, prescribe the extent to which such designated railroad may be relieved from the operation of this provision. No injustice shall be imposed upon any citizen at intermediate points. Nothing herein shall be so construed as to prevent the commission from making what are known as 'group rates' on any line or lines of railroad in this State.

"4. Penalty.—Any railroad company guilty of unjust discrimination as hereinbefore defined shall for each offense pay to the State of Texas a penalty of not less than five hundred dollars nor more than five thousand dollars.

"5. Exceptions.—Nothing herein shall prevent the carriage, storage or handling of freight free or at reduced rates, or to prevent railroads from giving free transportation or reduced transportation under such circumstances and to such persons as the law of this State may permit or allow."

Article 6476:

"Art. 6476. Penalty not otherwise provided

"If any railway company doing business in this State shall violate any provision of this title, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been

provided by law or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the Commission, for every such act of violation it shall pay to the State of Texas a penalty of not more than five thousand dollars."

Exhibit "C"

SENATE BILL 169, 32ND LEGISLATURE, ACTS 1911, p. 157

S. B. No. 109 Chapter 86.

An Act conferring authority upon the Railroad Commission, and making it its duty to adopt all necessary rates, charges and regulations to govern and regulate persons, associations, and corporations, private or municipal, owning or operating public wharves, docks, or piers, and all property used in connection therewith, or suburban, belt or terminal railroads in Texas, and to fix divisions of rates, charges and regulations between the same and railroads and all other common carriers under the control of the Railroad Commission where a deversion (division) is proper; providing that all laws made and prescribed for the government and control of railroads, shall, as far as applicable, be of equal force against such persons, associations and corporations; authorizing the Commission to require reports of such persons, associations, and corporations, and giving to said Commission power to correct abuses and prevent unjust discrimination and extortion in rates or

charges, of such persons, associations and corporations or any abuse by same; providing penalties for the violations of this Act, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Power and authority are hereby conferred upon the Railroad Commission of Texas over all public wharves, docks and piers and all elevators, warehouses, sheds, tracks and other property used in connection therewith in the State of Texas, and over all suburban, belt and terminal railroads in said State, and over all persons, associations and corporations, private or municipal, owning or operating any such railroad, wharf, dock, pier, elevator, warehouse, shed, track, or other property, and it is hereby made the duty of the said Railroad Commission to fix and adopt all necessary rates, charges and regulations, to govern and regulate said persons, associations and corporations, and to correct abuses and prevent unjust discriminations in the rates, charges and tolls of said persons, associations and corporations, and to fix divisions of rates, charges and regulations between same and railroads and all other common carriers, under the control of the Railroad Commission where a division is proper, and to correct and prevent any and all other abuses in the conduct of their business.

SEC. 2. If any person, association or corporation subject to the provisions of this Act, shall demand or receive a greater compensation for any service rendered or to be rendered than that fixed and established by the said Railroad Commission then, and in every such case, such person, association or corpor-

ation shall be deemed guilty of extortion and shall forfeit and pay to the State of Texas, a sum not to exceed five hundred dollars for each offense; provided, that if it shall appear that such violation was not wilful, said person, association or corporation shall have ten days to refund such over-charges or damages, in which case the penalty shall not be incurred, and the said Commission shall have authority and it shall be its duty to sue for and recover the same in the manner as may be prescribed by law for like suits against railroad companies.

SEC. 3. If any person, association or corporation subject to the provisions of this Act shall by any special rate, rebate, drawback or other device, or in any manner directly or indirectly charge, demand, collect or receive from any other person, association or corporation a greater or less compensation for any service rendered, or to be rendered, by it then it charges, demands, collects or receives from any other person, association or corporation for doing a like and contemporaneous service, or if any such person, association or corporation shall make or give any undue or unreasonable preference or advantage to any other person, association or corporation, or to any locality, or shall subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage, then and in any such case the person, association or corporation thus offending shall forfeit and pay to the State of Texas a sum not to exceed five hundred dollars ($500.00) for each and every offense.

SEC. 4. Said Railroad Commission shall have the same power to make and prescribe rules and regulations for the government and control of all such persons, associations and corporations as is or may

be conferred upon said Commission for the regulation of railroad companies, and such persons, associations and corporations shall issue no stock or bonds, except such as are authorized by the Railroad Commission under the provisions of the railroad stock and bond law of this State.

SEC. 5. The said Railroad Commission shall have the authority, and it shall be its duty to call upon such persons, associations and corporations for reports, and to investigate their books in the same manner as is or may be prescribed by law for the regulation of railroad companies; and said Commission shall have power and authority to institute suits and sue out such writs and process as may be applicable and authorized for the regulation of railroad companies. All laws made and prescribed for the government and control of railroad companies, and the valuation of their properties, in so far as they are applicable, shall be of equal force and effect against all such persons, associations and corporations.

SEC. 6. If any such person, association or corporation or other party at interest, be dissatisfied with any decision, rate, charge, toll, rule, order, act or regulation adopted by the Commission, such dissatisfied person, association, corporation or party may file a petition setting forth the particular cause or causes of objection to such decision, rate, charge, toll, rule, order, act or regulation, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against such Commission as defendant; said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court, either paty (party) to said ac-

tion may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court of all causes of a different character therein pending; provided, that if the court be in session at the time of such right of action accruing, the suit may be filed during such term and stand ready for trial after ten days' notice.

SEC. 7. The fact that there is now no adequate law for the regulation of such persons, associations and corporations, and the urgent necessity for such a law, create an emergency and an imperative public necessity that the rule requiring bills to be read on three several days be suspended, and the same is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved March 20, 1911.

Becomes a law ninety days after adjournment.